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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS
Petitioner,

v.

STATE OF OREGON,
Respondent.

MARIO BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia and the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* BAR ASSOCIATIONS, HUMAN RIGHTS ORGANIZATIONS AND OTHER LEGAL GROUPS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioners by several organizations, including bar associations, human rights and civil rights organizations, and other legal groups.[1] *Amici* include: Amnesty International USA, Bar Human Rights Committee of England & Wales, Center for Justice & Accountability, The Constitution Project, Hispanic National Bar Association, Human Rights Advocates, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights, and the Robert F. Kennedy Memorial Center for Human Rights.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Sup. Ct. R. 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

The Bar Human Rights Committee of England & Wales (BHRC) is an independent group of specialist advocates and experts who work on a voluntary basis to develop law and human rights protection throughout the world. BHRC objectives are: supporting and protecting lawyers and judges who are threatened or oppressed in their work; upholding the rule of law and internationally recognized human rights standards; furthering interest in and knowledge of human rights and the laws relating to human rights; advising, supporting and co-operating with other organizations and individuals working for human rights; and advising the Bar Council in connection with any human rights issue.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States and customary international law.

The Constitution Project seeks consensus solutions to difficult legal and constitutional issues. It does this through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. It has testified before federal and state legislative committees, and its work has been cited in numerous reports and studies by government agencies, the media, and law and policy organizations. The Constitution Project has released a report, *Mandatory Justice: The*

Death Penalty Revisited, which recognizes the role of the Vienna Convention in protecting the rights of foreign nationals in capital cases. The Constitution Project recognizes the implications of this case for protecting these rights.

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. The HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates. Proper application of Article 36 of the Vienna Convention is of particular interest to the HNBA, given its largely bilingual membership and its commitment to the rule of law. Its signatory representative was a participant in the Vienna Convention Discussion Group, which led to the decision of the Oregon Department of Justice to adopt new policies to improve compliance with the Convention, as noted in the letter of April 25, 2002 from the Deputy Attorney General to William Howard Taft IV, Legal Advisor in the United States Department of State.

Human Rights Advocates is a non-profit organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus curiae* before a number of U.S. courts including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth Circuit Courts of Appeals, and the California

Supreme Court. Human Rights Advocates also appears before international fora including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Human Rights First works in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous *amicus* briefs before the U.S. Supreme Court and other U.S. courts and international bodies.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed *amicus* briefs before various bodies, including U.S. courts and international tribunals.

The League of United Latin American Citizens

(LULAC) is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States and foster respect for the rule of law. We believe in the democratic principle of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

The Mexican American Bar Association (MABA) is one of the most prominent and largest Latino bar associations in Southern California and the nation. MABA is a volunteer entity, with its success resting on the commitment of its members and supporters. MABA members include over 800 attorneys, judges, politicians, and business people of various ethnic backgrounds. Aside from being pacesetters in their respective fields of law, MABA members maintain prominent roles in local government and in all media avenues such as radio, television and journalistic mediums. MABA is committed to the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy.

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national non-profit organization whose mission is to protect the civil rights of the more than 40 million Latinos living in the United States. Through its work, MALDEF recognizes the importance of ensuring that all foreign nationals are assured the rights afforded by law, including the right to confer with their native consulates.

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based non-profit organization

committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including cases before the Inter-American Court of Human Rights.

The Robert F. Kennedy Memorial Center for Human Rights (CHR) is a non-profit organization working to advance Robert F. Kennedy's vision of social justice by promoting the full spectrum of human rights throughout the world. The annual RFK Human Rights Award honors individuals who, at great risk, stand up to government oppression in the nonviolent pursuit of respect for human rights. The CHR develops and carries out projects, which enhance and complement the social change agendas of the laureates. Their work includes advocacy and legal projects with the U.S. and foreign governments, international agencies and other human rights organizations. The CHR has promoted the respect and implementation of the legal norms related to human rights at a domestic and international level, including cases before the International Labor Organization, the Inter-American Commission on Human Rights, and the World Bank Inspection Panel, encouraging both the U.S. and foreign governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts

will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

Each of these organizations recognizes the importance of the rule of law and U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, and local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention"), state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration of Vienna Convention violations. Without appropriate guidance from this Court, state courts and lower federal courts will continue to disregard international law and U.S. treaty obligations as the Supreme Courts of Virginia and Oregon have done.

While *Amici* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the negative implications and practical consequences of U.S. failure to comply with the Vienna Convention.

SUMMARY OF ARGUMENT

Long before these cases arose, the Executive and Legislative branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. Article 36 of the Vienna Convention provides

that foreign nationals must be informed of their right to seek consular assistance when detained.[2] It is firmly established that Article 36 creates individual rights and that the United States is legally obligated to recognize these rights in its courts.

Respect for the rule of law is an essential component of U.S. foreign policy. Foreign governments expect, therefore, that the United States will comply with its obligations under the Vienna Convention, a duly ratified treaty. Indeed, it is in our national interest to do so. The Vienna Convention protects vulnerable migrants in our country. But it also protects U.S. citizens abroad, including tourists, business travelers, and military personnel. Failure to adhere to the obligations set forth in the Vienna Convention will undermine consular assistance in the United States and violations will inevitably be replicated abroad.

In *Bustillo v. Johnson*, No. 042023 (Va. March 7, 2005) and *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005), two state courts have completely disregarded the Vienna Convention. Quite simply, the failure of these courts to respect U.S. treaty obligations undermines the rule of law,

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[2] These branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77 ("Optional Protocol"). The Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention. Although the United States recently withdrew from the Optional Protocol, this withdrawal does not change the U.S. agreement to fulfill its obligations under the Vienna Convention. Nor does the U.S. decision to withdraw from the Optional Protocol change the U.S. position on the Vienna Convention itself: specifically, that the substantive guarantees of the Vienna Convention should be enforced by local, state, and federal authorities.

long a central feature of U.S. foreign policy. These state court decisions also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance by the United States will be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention and with the U.S. policy of promoting a unified rule of law that respects our international obligations.

ARGUMENT

I. RESPECT FOR THE RULE OF LAW IS AN IMPORTANT COMPONENT OF U.S. FOREIGN POLICY

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order.[3] No less a realist than former Secretary of State Henry A. Kissinger

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[3] The United States has repeatedly asserted that international law is "the web of mutual obligation which binds us together . . . [and] shields us from chaos and from disorder." Memorial of United States of America, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 228 (Dec. 29, 1979) (*quoting* Secretary of State Cyrus Vance, Remarks to U.N. Security Council). Moreover, the failure to redress violations of international norms "promotes repetition" of violations, eroding international order. Or. Arg. of United States, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 255.

has noted that "[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity." Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep't St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep't St. Bull., 644, 644 (May 21, 1973) ("States comply with [international] law . . . because it is politic to do so."); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html ("As a nation, we have, more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law—law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.").

In addition, the United States has promoted respect for international law because it reflects important American values; "[i]t is a repository of our experience and our idealism." Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, *in* U.S. Dep't of St. Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in

Internal Affairs 1975 *Digest* § 1, at 16 ("It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies."); Kissinger, *supra*, at 362 ("[D]edication to international law has always been a central feature of our foreign policy.").

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. U.S. Secretary of State Condoleezza Rice has emphasized the importance of the rule of law in promoting stability and cooperation throughout the world:

> America is a country of laws. When we observe our treaty and other international commitments, our country -- other countries are more willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

U.S. Secretary of State Condoleezza Rice, Remarks at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), *at* http://www.state.gov/secretary/rm/2005/44159.htm. Similarly, the U.S. Deputy Permanent Representative to the United Nations noted in remarks to the U.N. Security Council:

> [E]stablishing and maintaining the rule of law has been an enduring theme of

> American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* http://www.un.int/usa/03_147.htm. Thus, promotion of the rule of law historically has been a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

> As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

Id. at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("Let me get right to the point. . . . Here's what America believes in: We believe in justice and promotion of the rule of law.").

Foreign governments, therefore, expect that the United

States will be a leader in complying with the obligations set forth in the Vienna Convention. In so doing, it demonstrates to "the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* http://usinfo.state.gov.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

II. THE CONSULAR ASSISTANCE PROVISIONS OF THE VIENNA CONVENTION ARE ESSENTIAL FOR PROTECTING THE RIGHTS OF FOREIGN NATIONALS

Governments have long recognized the importance of consular relations. Luke Lee, Consular Law and Practice 3-7 (2d ed. 1991); Oppenheim's International Law 1132-34 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Constantin Economides, *Consuls*, *in* 1 Encyclopedia of Public International Law 770 (Rudolf Bernhardt ed. 1992). The Vienna Convention on Consular Relations, which was adopted in 1963 and has been ratified by 168 countries, has been referred to as "undoubtedly the single most important event in the entire history of the consular institution." Lee, *supra*, at 27.

The Vienna Convention defines and guarantees consular rights, privileges, and duties among signatory

states.[4] One of the most important responsibilities of consular officials is to protect their nationals. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, their nationals at all times. Foreign nationals shall have the same freedom of communication and access to consular officials. A particularly sensitive issue arises when a foreign national is detained by law enforcement officials. In these cases, Article 36(1)(b) of the Vienna Convention provides that law enforcement officials of signatory states must notify detained foreign nationals that they have a right to communicate with, and have access to, their consular officials. If the detained national makes such a request, the appropriate consular post must be notified. In addition, Article 36(1)(c) grants consular officials the right to visit, converse and correspond with detained foreign nationals and to arrange for their legal representation. Finally, Article 36(2) provides that the laws and regulations of each signatory state must enable full effect to be given to these rights. In sum, Article 36 of the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

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[4] Article 5 of the Vienna Convention lists a number of consular functions. These cover a wide variety of responsibilities, including: furthering the development of commercial, economic, cultural and scientific relations between signatory states; issuing passports and travel documents; serving as a notary and civil registrar; and transmitting judicial documents or executing letters rogatory or commissions to take evidence.

It is essential to recognize the purpose of consular assistance when interpreting Article 36.[5] Foreign nationals are at a distinct disadvantage when detained by law enforcement officials.[6] Indeed, migrants are a particularly vulnerable group.[7] They may have a poor command of the

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[5] It is a fundamental canon of interpretation that "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1987). *See also* Norfolk Southern Ry. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 397 (2004) *citing* Green v. Biddle 21 U.S. 1, 89 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.").

[6] *See, e.g.*, Amnesty International, United States of America: Osvaldo Torres, Mexican National Denied Consular Rights, Scheduled to Die (Apr. 2, 2004), *available at* http://web.amnesty.org/library/Index/ENGAMR510572004. ("A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.").

[7] Unsurprisingly, agreements concerning the rights of migrants emphasize the significance of consular assistance. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *entered into force* Dec. 18, 1990, art. 16(7) (Dec. 18, 1990), requires that consular notification information be provided to a migrant worker or a member of his or her family when arrested or detained in other manner. Significantly, the provision is almost identical to Article 36 of the Vienna Convention. *See also* U.S. Department of State, Implementing the Summit of the Americas Migrant Workers Initiative (Apr. 7, 2000) ("[T]he United States takes the position that all foreign nationals are entitled to

English language and will likely be unfamiliar with the U.S. criminal justice system. Their understanding of the entire criminal process, including the role of law enforcement officials, public defenders, and judges, may be profoundly influenced by experiences in their countries of origin. Accordingly, consular officials act as a cultural bridge to foreign nationals. While consular officials do not provide legal advice, they provide foreign nationals with critical information that allows them to understand any legal advice provided by defense attorneys. Thus, consular assistance is fundamentally and qualitatively distinct from assistance provided by defense counsel.

In light of these considerations, it is not surprising that the International Court of Justice has indicated that Article 36 creates individual rights and that signatory states must protect these rights.[8] On two occasions, the ICJ has definitively interpreted the Vienna Convention in cases involving foreign nationals who were not informed of their right to seek consular assistance in the United States.[9] *See LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 104 (June 27) ("*LaGrand*"); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (March 31) ("*Avena*").

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consular notification and access, regardless of their visa or immigration status in the United States. Thus 'illegal' aliens have the same rights to consular assistance as do 'legal' aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.").

[8] To reiterate, the U.S. decision to withdraw from the Optional Protocol has no bearing on the ICJ's authoritative and binding interpretations of the Vienna Convention.

[9] The opinions of the International Court of Justice are available at www.icj-cij.org.

In June 2001, the ICJ considered the Vienna Convention in an action filed by Germany against the United States. *LaGrand*, *supra*. In *LaGrand*, the ICJ held that Article 36(1) of the Vienna Convention creates individual rights and the clarity of these provisions "admits of no doubt." *LaGrand*, para. 77. The ICJ went on to find that the United States had violated those rights and that procedural default rules could not be used to bar a defendant from making a Vienna Convention claim. *Id.* para. 91.

In March 2004, the ICJ considered the Vienna Convention in an action filed by Mexico against the United States. *Avena*, *supra*. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. *Avena*, para. 40. It then held that the United States violated the rights of fifty-one Mexican nationals. *Id.*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ. Significantly, the ICJ stated that its conclusions applied to all foreign nationals subject to similar situations in the United States.

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Id., para. 151.

In sum, the Vienna Convention is essential for protecting the rights of foreign nationals. As a signatory to the Vienna Convention, the United States is obligated to protect these rights. But this has not occurred.

III. FAILURE TO COMPLY WITH THE VIENNA CONVENTION WILL UNDERMINE CONSULAR ASSISTANCE IN THE UNITED STATES AND VIOLATIONS WILL BE REPLICATED ABROAD

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention,

making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969. As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), *available at* http://travel.state.gov/pdf/CNA_book.pdf.[10]

The consular posts of governments throughout the world, including those of the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna

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[10] The United States became obligated to comply with the Vienna Convention immediately upon ratification, and no implementing legislation was necessary. Upon submitting the Vienna Convention to the Senate, the Executive branch stated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lycerly, Deputy Legal Adviser). More recently, the U.S. State Department has indicated that "[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Consular Notification and Access, *supra*, at 44.

Convention, art. 36, para. 1(c).

All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep't of St., 7 *Foreign Affairs Manual*, *available at* http://travel.state.gov/pdf/CNA_book.pdf. As our consular officials are informed, "[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Id.* § 412 (Sept. 1, 2004). U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department's *Foreign Affairs Manual*, consular officers are expected "to be particularly active in, and to fully engage in, the [detained individual's] case during the often-lengthy pretrial period." *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services" as well as to "keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges." *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage, where U.S. policy instructs consular officers to continue providing appropriate services, including acting as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

U.S. consular posts are not unique in the services they

provide. For example, Mexican consular officials offer specific assistance to Mexican nationals detained in the United States. *See Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings." *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also "obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation." *Id.* at 11 (Chapel, J., specially concurring).

If U.S. courts fail to honor the Vienna Convention, the procedures developed by foreign governments to assist and protect the rights of their citizens are of little benefit. These same rights afforded by the Vienna Convention to Americans abroad would also be jeopardized. The protections of the Vienna Convention are reciprocal in nature, and U.S. noncompliance will inevitably be replicated abroad. This basic feature of international law – its reciprocal nature – is recognized and accepted by the United States.[11] The U.S. Legal Adviser has acknowledged the reciprocal nature of the Vienna Convention:

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[11] As the U.S. government has repeatedly asserted "[r]eciprocity . . . underlies all relations between nations." Brief of the United States at 17 n.11, *Boos v. Barry*, 485 U.S. 312 (1988) (arguing that special security restrictions around foreign embassies were justified as a

> These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.[12]

Taft, *supra*, at 15. Significantly, the *Foreign Affairs Manual* also recognizes the reciprocal nature of Vienna

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necessary part of our reciprocal obligations under the Vienna Convention on Diplomatic Relations and asserting that in "appealing to the justice and the humanity of [other] governments to protect our embassies. . . at least we must show some intent upon our part to treat their embassies and their consulates in our country the same way."). *See also* Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.").

[12] A similar statement was issued by the U.S. Department of State in a case involving a Paraguayan national who was executed in Virginia and who was never informed of his Vienna Convention rights. According to the Department of State, "[w]e fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State, Released in Asuncion, Paraguay (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html.

Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because "U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals." U.S. Dep't of St., 7 *Foreign Affairs Manual* § 421.2-3 (Sept. 3, 2004). In these situations, U.S. consular officials are instructed to point out that "[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations." *Id.* at 421.2-3(a).

There are many reasons why countries comply with international law, "including the unarticulated recognition by states generally of the need for order, and of their common interest in maintaining particular norms and standards . . . ." Restatement (Third), *supra*, at pt I (intro. note). Reciprocity also promotes cooperation and compliance. Accordingly, the United States must recognize the consequences of violating the Vienna Convention, both for the national interest and for the well-being of its citizens.

CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*,

who seek to promote respect for the rule of law in their own work on a daily basis.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention.

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